United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7127

United States Court of Appeals

FOR THE SECOND CIRCUIT

JACKSON O. KING,

Plaintiff-Appellee,

—against—

DEUTSCHE DAMPS-GES,

Defendant and Third Party Plaintiff-Appellee-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and COURT CARPENTRY & MARINE CONTRACTING COMPANY,

Third Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE-APPELLANT TO PETITION FOR REHEARING AND/OR REHEARING *IN BANC* OF THIRD PARTY DEFENDANT-APPELLANT, COURT CARPENTRY & MARINE CONTRACTING COMPANY

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Preliminary Statement

After a trial before the Court with a jury in this case, judgment was entered in favor of the plaintiff to recover damages for his personal injuries from the defendant ship-

owner on the grounds that defendant's vessel, the m/s Trautenfels, was unseaworthy. Plaintiff's recovery was reduced by 25% due to his own contributory negligence.

Judgment was also entered in favor of the defendant third party plaintiff shipowner for indemnity against International Terminal Operating Co., Inc., the stevedore contractor which had loaded cargo aboard the vessel, and Court Carpentry and Marine Contracting Company, the employer of the plaintiff, a lasher.

In its opinion of August 8, 1975, this Court affirmed the judgment below. By way of petition for rehearing, third party defendant, Court Carpentry & Marine Contracting Company, seeks an amendment of the judgment to provide that only 25% of the judgment in favor of the third party plaintiff be against Court Carpentry and the balance against International Terminal Operating Co., Inc. In the alternative, Court Carpentry asks that it recover from International Terminal Operating Co., Inc. any liability on its part to the third party plaintiff shipowner in excess of 25% of the judgment. By its order of September 5, 1975, this Court directed all parties except plaintiff to respond to Court Carpentry's petition.

DEFENDANT AND THIRD PARTY PLAINTIFF-APPELLEE-APPELLANT'S POSITION ON THE PETITION FOR REHEARING

The judgment in favor of defendant and third party plaintiff-appellee-appellant for full indemnity against third party defendant-appellant, Court Carpentry & Marine Contracting Company, should not be disturbed. Defendant and third party plaintiff shipowner takes no position regarding Court Carpentry's claim for contribution against International Terminal Operating Co., Inc.

POINT I

Court Carpentry's claim is untimely.

The basis for Court Carpentry's petition for rehearing seeking to apportion the indemnity damages recovered by defendant and third party plaintiff shipowner was not pleaded, was not presented at the District Court level, and was not presented in the original appeal to this Court. For this reason, Court Carpentry has waived its rights to present this claim for apportionment of damages at this extremely late stage in the litigation. Nowhere in the record on appeal has counsel for defendant and third party plaintiff discovered any reference by counsel for Court Carpentry to any limitation of its liability to the percentage of plaintiff's contributory negligence. Such a defense is not pleaded (See Appendix on appeal p. 540-544), and nowhere in the record does counsel for Court Carpentry present such an argument. Even if Court Carpentry's counterclaim for indemnity against the shipowner is construed broadly enough to have preserved its present claim for apportionment at the pleading stage, such claim was clearly waived by Court Carpentry's failure to present it at trial.

It has been held on several occasions by this Court that the failure to raise a defense at the time of the trial of an action precludes the party from raising that claim on appeal. See, e.g., *O'Connor* v. *United States*, 269 F. 2d 578 (2 Cir., 1959); *Engineers' Ass'n* v. *Sperry Gyroscope Co.*, 251 F. 2d 133 (2 Cir., 1958), *cert. denied*, 356 U.S. 932.

The federal appellate courts are even more reluctant to allow the introduction of new matter for the first time on petition for rehearing. For example, this Court in *Jones*

v. *Zurich General Accident & Liability Ins. Co.*, 121 F. 2d 761 (2 Cir., 1941), stated at p. 764:

> "Ordinarily, however, matters outside the record may not first be advanced for consideration on appeal and certainly not on petition for rehearing after appeal."

See also, *Carr* v. *F.T.C.*, 302 F. 2d 688 (1 Cir., 1962) where the Court stated:

> "The . . . petition for rehearing raising this allegedly vital point contains no mention of why it was first developed at this late date, let alone any apology for so doing."

The Court concluded by denying the petition for rehearing.

POINT II

Third party defendant, Court Carpentry, is not entitled to any apportionment of damages against the defendant and third party plaintiff shipowner.

In its petition for rehearing, Court Carpentry asks for an apportionment of its damages limiting its liability to the third party plaintiff shipowner to 25% of the shipowner's damages. Only alternatively does Court Carpentry seek contribution from I.T.O.

By its claim to limit its liability to the shipowner to 25%, Court Carpentry is, in effect, seeking to substitute contribution for indemnity. However, the instant case is not one where contribution is proper. First, and most fundamentally, there is not a joint tortfeasor relationship between the shipowner third party plaintiff and Court Carpentry. It is important to note that the shipowner was not adjudged negligent and that the only ground for its

liability to the plaintiff was the unseaworthiness of the vessel. Second, the issue of contribution should not be reached until the threshold issue of indemnity has been reached, and has been determined adversely to the indemnitee. Third, there can be no contribution where one party is plaintiff's employer and thereby immune from direct suit.

In *Cooper Stevedoring Co.* v. *Kopke*, 417 U.S. 106 (1974), the trial court held that the shipowner's conduct was sufficient to preclude indemnity. As this finding was not challenged on appeal, the Supreme Court held it lacked jurisdiction to determine the shipowner's entitlement to indemnity, 417 U.S. at 109, n. 4. Only when the shipowner's indemnity claim was rejected did the Court proceed to examine the claim for contribution. The Supreme Court was careful to let stand the holding in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952), that contribution in non-collision maritime cases was not permitted against a joint tortfeasor immune by statute from direct tort liability to the plaintiff. The Court in *Kopke* also pointed out that a party is not a joint tortfeasor where its liability rests upon the warranty of seaworthiness alone, noting in a discussion of *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U.S. 340 (1972), that

> "... to the extent Erie was not negligent but nevertheless subject to a suit on a seaworthiness theory, Erie was not a joint tortfeasor against whom contribution could be sought." 417 U.S. at 115.

By seeking an apportionment of damages limiting its liability to 25% of the shipowner's damages, Court Carpentry is by indirection seeking to force the shipowner to accept contribution instead of indemnity. This of course is prohibited by the Supreme Court's decsion in *Halcyon, supra,*

and *Atlantic Coastline R. Co., supra,* since Court Carpentry was plaintiff's employer.

The argument for apportionment between the shipowner and the third party defendant of the shipowner's damages to the plaintiff has been made in a number of cases without success. In *Hartnett* v. *Reiss Steamship Co.,* 421 F. 2d 1011 (2 Cir., 1970), third party defendant, also plaintiff's employer, sought an apportionment of damages so that it would only be liable for 25% of plaintiff's recovery on the ground that both the shipowner and the stevedore were both independently liable to palintiff and the employer's obligation was only to bear equally with the stevedore the burden of satisfying the shipowner. This argument was rejected by this Court, and it was decreed that each third party defendant bear half of the ultimate liability.

More recently, in a case similar to the one at bar, *Yamashita-Shinnihon Kisen, K.K.* v. *W. J. Jones & Son, Inc.,* 474 F. 2d 847 (9 Cir., 1973) third party defendant stevedore, employer of the plaintiff, sought an apportionment of damages with the shipowner. The Court of Appeals for the Ninth Circuit rejected the stevedore employer's argument and held:

> "Under these circumstances, we see no reason, even assuming that *Halcyon* is no bar, to formulate judicial rules of apportionment. We hold that Jones' counterclaim to Yamashita's indemnity suit did not entitle Jones to an apportionment of damages."

Still more recently, in *Farrell Lines, Inc.* v. *Carolina Shipping Co.,* 509 F. 2d 53 (4 Cir., 1975), the defendant stevedore argued on rehearing that contribution rather than full indemnity was proper under the Supreme Court's decision in *Cooper, supra,* claiming that the stevedore and the shipowner were joint tortfeasors. The Court of Ap-

peals for the Fourth Circuit rejected this argument, stating:

> "It may be, as the stevedore argues most persuasively in its petition for rehearing, that the general thrust of Kopke is in the direction of a sort of tort indemnity in cases of this type, where contribution among the joint tort-feasors would be the rule, but the fact remains that Kopke did not purport to overrule Ryan and Weyerhaeuser wherein the principle of indemnity on which the shipowner's action was predicated was developed. Those cases are plain to the point that, unless the ship's fault is sufficient to preclude indemnity, the ship is entitled to indemnity from the stevedore under circumstances such as those here. While we recognize the equitable appeal of the claim of apportionment raised by the stevedore, we do not feel it appropriate for us to do what the Supreme Court in Kopke chose not to do; any reversal or change in the scope of Ryan and Weyerhaeuser should come from the Supreme Court and not from an intermediate court. The petition for rehearing on the part of the stevedore is accordingly denied." (Footnote omitted)

Moreover, whatever "equitable appeal" the court in *Carolina* may have found is entirely lacking in the case at bar. Here, we have a non-negligent shipowner that has been rendered initially liable without fault to the plaintiff solely for breach of its absolute duty to provide a seaworthy vessel to the plaintiff.

The decisions in *Hartnett, Yamashita* and *Carolina, supra,* are not inconsistent with this Court's decision in *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (2 Cir., 1974). There, this Court allowed an apportionment of damages between a joint tortfeasor shipowner and a

non-employer third party defendant after an initial determination, as in *Cooper,* that the shipowner's conduct precluded it from obtaining full indemnity over against the third party defendant repair company.

Thus, it appears from the cases that the issue of contribution or apportionment of damages is only reached where the party sought to be held is not the employer of the plaintiff and after an unfavorable determination of the shipowner's entitlement to indemnity, i.e., a full recovery over, has been made. In the case at bar, the shipowner has been adjudged entitled to full indemnity. It has not been found negligent let alone been found guilty of conduct sufficient to preclude indemnity.

Therefore, it is respectfully submitted that the holdings of this Court in *Mortensen* v. *A/S Glittre,* 348 F. 2d 383 (2 Cir., 1965); *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir., 1969), *cert. denied,* 395 U.S. 946; and *Hartnett* v. *Reiss Steamship Co., supra;* relied upon by this Court in its opinion of August 8, 1975, are fully dispositive of the issue between the shipowner and Court Carpentry. The involvement of multiple third party defendants should not affect the indemnity claim of the shipowner. See *DeGioia* v. *United States Lines Co.,* 304 F. 2d 421 (2 Cir., 1962). As a result, Court Carpentry's claim for an apportionment of the shipowner's damages to the plaintiff should be rejected.

CONCLUSION

The decision of this Court of August 8, 1975, granting the shipowner full indemnity against both Court Carpentry and I.T.O., jointly and severally, should not be disturbed, and Court Carpentry's petition for rehearing should be denied.

Respectfully submitted,

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